JUL 12 2001

No. 99-1823

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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July 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of Respondent Waffle House, Inc. before this Court.

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 350 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to proper interpretation and application of equal employment laws and regulations. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment, including agreements to arbitrate disputes arising out of the employment relationship. EEAC's members are interested in the extent to which such contractual commitments to arbitrate provide the exclusive forum for resolving covered employment disputes, and in the ability or the inability of public enforcement agencies to circumvent such choices of forum.

Thus, the issue presented in this case, namely, whether the U.S. Equal Employment Opportunity Commission (EEOC) may pursue victim-specific remedies on behalf of an employee who has agreed to arbitrate such claims, is extremely important to the nationwide corporate constituency that EEAC represents. The Court of Appeals properly limited the EEOC's remedies in this case to injunctive relief where

the employee for whom the agency sought individual relief voluntarily agreed to submit his claims to an arbitral forum. In so doing, the lower court upheld the strong public policy, which this Court recently reaffirmed in *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001), in favor of arbitration as an alternative means of resolving employment-related disputes. Because of its interest in the enforcement and effect of agreements to arbitrate employment-related disputes, EEAC filed *amicus curiae* briefs with this Court in *Circuit City* and in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Thus, EEAC has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency authorized to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, as well as other federal employment nondiscrimination laws. Respondent Waffle House, Inc. is a private employer subject to these and other federal and state employment nondiscrimination laws.

Waffle House maintains a standard employment application form, which contains a provision requiring applicants, as a condition of employment, to agree to arbitrate any future employment-related disputes. Applicants who elect not to sign the application form and thereby submit future claims to arbitration are not considered for employment.

In 1994, Eric Scott Baker completed and signed an application for employment with Waffle House at its

Columbia, South Carolina facility. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 807 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001). After declining to accept a position at the Columbia facility, Baker was referred to another Waffle House facility located in West Columbia, South Carolina, where he was offered and accepted a position as a grill operator. Baker did not complete another application at the West Columbia location. Waffle House terminated Baker's employment shortly thereafter. *Id.*

Upon the termination of his employment, Baker filed a charge of discrimination with the EEOC, alleging that Waffle House engaged in discriminatory employment practices in violation of the ADA. *Id.* After investigating Baker's charge, the EEOC filed a public enforcement action, in which it sought permanent injunctive relief against Waffle House, as well as back pay, reinstatement, and compensatory and punitive damages on behalf of Baker individually.

Waffle House filed a petition under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, to compel arbitration of Baker's claim pursuant to the arbitration agreement he signed as part of his employment application. 193 F.3d at 808. The U.S. District Court for the District of South Carolina denied the petition, ruling that Baker and the Waffle House had not entered into a valid arbitration agreement with respect to Baker's employment at the West Columbia, South Carolina facility. *Id.*

On appeal, the U.S. Court of Appeals for the Fourth Circuit concluded that the arbitration agreement contained in Baker's signed employment application was valid and governed his employment with Waffle House at the West Columbia facility, even though Baker never completed a new application there. *Id.*[2] It ruled further that the EEOC, while

[2] The validity of the arbitration agreement is not now before this Court and therefore, for purposes of this matter, is resolved.

not compelled to arbitrate its own claims, was precluded from seeking individual remedies on behalf of Baker as a result of his agreement with Waffle House to arbitrate all employment-related claims. 193 F.3d at 812. Thus, the Court of Appeals determined that the EEOC was permitted only to seek injunctive relief in its public enforcement role. *Id.*

On May 15, 2000, the EEOC filed a petition with this Court for a writ of certiorari on the issue of whether it may pursue victim-specific remedies as part of a public enforcement action in its own name, where the employee on whose behalf the relief is sought has entered into a valid agreement to arbitrate employment claims. The Court granted the petition.

SUMMARY OF ARGUMENT

In ruling that the EEOC may not pursue victim-specific remedies on behalf of an individual who has agreed to arbitrate his employment claims, the court below joins the U.S. Courts of Appeals for the Second and the Eighth Circuits in imposing similar limitations on the relief available in public enforcement actions. *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998); *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir.), *cert. denied*, 121 S. Ct. 383 (2000). In fact, the Sixth Circuit is the only federal appellate court to rule to the contrary. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999). Because the Sixth Circuit misapprehended the interrelationship of an EEOC enforcement action and an employee's voluntary agreement to arbitrate her discrimination claims, this Court should reject that court's holding in *Frank's Nursery* and adopt the well-reasoned approach taken by the Second, Fourth and Eighth Circuits.

While the government attempts in its brief to this Court to decouple the EEOC's enforcement authority under Title VII from the various means by which an individual charging party may resolve his or her claims, the two pursuits are, in

fact, interrelated. In particular, an individual's contractual and other choices limit the extent to which the agency can pursue relief on that individual's behalf. U.S. Equal Employment Opportunity Commission, *EEOC: Guidance on Waivers Under the ADA and Other Civil Rights Laws*, EEOC Compl. Man. (BNA) N:2345, N:2347 (Apr. 10, 1997)(citing *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996); *EEOC v. Cosmair*, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987); *EEOC v. United States Steel Corp.*, 671 F. Supp. 351, 358 (W.D. Pa. 1987), *rev'd on other grounds*, 921 F.2d 489 (3d Cir. 1990)).

This Court long has recognized the validity of arbitration as a means of resolving employment-related disputes. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court ruled that claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, can be subject to compulsory arbitration. In so doing, the Court reiterated its "strong endorsement of the federal statutes favoring this method of resolving disputes." 500 U.S. at 30 (citation omitted). Most recently, in *Circuit City Stores, Inc. v. Adams*, the Court reaffirmed the strong public policy favoring agreements to arbitrate employment disputes, acknowledging the "real benefits to the enforcement of arbitration provisions" while soundly rejecting "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001).

Permitting the EEOC to pursue monetary damages on behalf of individuals who have signed valid agreements to arbitrate their employment claims would countermand this Court's pronouncements in *Circuit City* and *Gilmer* by thwarting the primary purpose for which arbitration is used—to replace the costs and delays of protracted litigation with the efficiency and finality of the arbitral forum. It also would substantially undermine any incentive employers now have to enter into arbitration agreements.

ARGUMENT

I. THIS COURT SHOULD ENDORSE THE WELL-REASONED APPROACH TAKEN BY THE SECOND, FOURTH, AND EIGHTH CIRCUIT COURTS OF APPEALS, WHICH STRIKES A PROPER BALANCE BETWEEN THE GOVERNMENT'S DUTY TO ERADICATE UNLAWFUL DISCRIMINATION AND THE STRONG PUBLIC POLICY FAVORING PRIVATE AGREEMENTS TO ARBITRATE

A. The Court Below Joins the Second and Eighth Circuit Courts of Appeals in Properly Disallowing Pursuit of Victim-Specific Relief in a Public Enforcement Action on Behalf of an Individual Who Has Agreed To Arbitrate Employment-Related Claims

In ruling that the EEOC may not pursue victim-specific remedies on behalf of an individual who voluntarily has agreed to arbitrate his employment claims, the Court of Appeals joins the Second and the Eighth Circuits in imposing similar limitations on the relief available in public enforcement actions. *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998); *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir.), *cert. denied*, 121 S. Ct. 383 (2000). In *Kidder, Peabody*, the EEOC initiated a public enforcement action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, in which it sought back pay, reinstatement, and liquidated damages on behalf of a class of former Kidder investment bankers, all of whom had signed valid agreements to arbitrate employment

claims.[3] 156 F.3d at 300. Kidder moved to dismiss the EEOC's action, arguing that the arbitration agreement each former employee had signed precluded the EEOC from pursuing victim-specific remedies on their behalf.[4] *Id.*

Relying on this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, the district court granted Kidder's motion to dismiss. It reasoned that permitting the EEOC to pursue victim-specific remedies on behalf of former employees who had agreed to arbitrate their employment claims "would frustrate the purpose of the FAA because an employee, having signed the agreement to arbitrate, could avoid arbitration by having the EEOC file in the federal forum seeking back pay on his or her behalf." 156 F.3d at 300.

On appeal, the Second Circuit affirmed the district court's dismissal of the EEOC's action, relying, as the district court had, on *Gilmer*. Noting the competing interests between "allowing the EEOC broad authority to pursue actions to eradicate and prevent employment discrimination" and "encouraging parties to arbitrate," the court reasoned:

> [T]he result reached by the district court, allowing the EEOC to pursue injunctive relief in the federal forum while encouraging arbitration of the employee's claim for private remedies, strikes the right balance between these interests. Further, to permit an individual, who has freely agreed to arbitrate all employment claims, to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages

[3] Although the EEOC initially sought injunctive relief in addition to victim-specific remedies, it dropped that claim after Kidder, Peabody discontinued its investment banking operations. 156 F.3d at 300.

[4] Indeed, three of the nine investment bankers on whose behalf the EEOC sought make-whole relief unsuccessfully had arbitrated their claims while the agency's action was being litigated.

> on his or her behalf would undermine the *Gilmer* decision and the FAA.

156 F.3d at 303.

Applying the Second Circuit's holding in *Kidder, Peabody*, the Eighth Circuit in *Merrill, Lynch v. Nixon* ruled correctly that the Missouri Commission on Human Rights (MCHR) could seek injunctive but not monetary relief in a state administrative action, brought in its own name, on behalf of an employee who voluntarily had agreed to arbitrate his employment-related disputes. *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir.), *cert. denied*, 121 S. Ct. 383 (2000). The Eighth Circuit explained that when a public enforcement agency seeks victim-specific relief "such as back pay [which] is highly individual in nature . . . [it] acts more as a representative for [the employee] than as a separate entity seeking to vindicate public rights." 210 F.3d at 818. The agency therefore may not pursue such remedies on behalf of an employee who voluntarily has agreed to submit his individual claims to an arbitral forum.

Considering "whether the federal arbitration statutes create some federal right for Merrill, Lynch, and whether the actions of the MCHR in this case would interfere with that right," the court concluded, "the answer to both questions is yes." 210 F.3d at 817. It reasoned that the Civil Rights Act of 1991 confirms the right of employers and employees to enter into private agreements to arbitrate employment-related disputes and determined that allowing the MCHR to proceed with its action on claims subject to arbitration "would interfere with this right." *Id.*

The Sixth Circuit is the only federal appellate court to rule that a public enforcement agency may pursue victim-specific remedies where the employee on whose behalf the relief is sought is subject to a valid arbitration agreement. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999). As more fully set forth below, the Sixth Circuit

misapprehended the interrelationship of an EEOC enforcement action and an employee's voluntary agreement to arbitrate his or her discrimination claims. Accordingly, this Court should reject that court's holding in *Frank's Nursery* and adopt the well-reasoned approach taken by the Second, Fourth and Eighth Circuits.

B. The EEOC's Enforcement Authority Under Title VII and an Individual's Conduct in Resolving Statutory Claims Are Not Mutually Exclusive

The EEOC is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). As the EEOC points out in its brief to this Court, the agency's authority under Title VII includes the right "to bring a civil action against any respondent . . . named in the charge." 42 U.S.C. § 2000e-5(f)(1). If the EEOC elects not to pursue an action against a respondent to a Title VII charge of discrimination, it must notify the charging party of his or her right to pursue a private right of action in federal court. *Id.*

While the government attempts to minimize the relationship between its enforcement authority under Title VII and the various means by which an individual charging party may resolve his or her claims, the two pursuits are, in fact, closely intertwined. As a practical matter, the individual's actions in making contractual and other choices directly affect the relief that the EEOC may seek. In particular, as the government concedes in its brief, an individual's own conduct in resolving his or her claim may limit the extent to which the agency is permitted to pursue

monetary relief on that individual's behalf. Pet. Br. at 38-39 n.13.

In guidance to its own investigative staff, the EEOC confirmed that it cannot obtain remedies on behalf of an individual who has settled his or her claim:

> [E]ven though an individual who has signed a waiver agreement or otherwise settled a claim subsequently files a charge with the Commission based on the same claim, the employer will be shielded against any further recovery by the charging party provided the waiver agreement or settlement is valid under applicable law. This is true whether the EEOC or the private individual brings a subsequent action.

U.S. Equal Employment Opportunity Commission, *EEOC: Guidance on Waivers Under the ADA and Other Civil Rights Laws*, EEOC Compl. Man. (BNA) N:2345, N:2347 (Apr. 10 1997) (citing *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996); *EEOC v. Cosmair*, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987); *EEOC v. United States Steel Corp.*, 671 F. Supp. 351, 358 (W.D. Pa. 1987), *rev'd on other grounds*, 921 F.2d 489 (3d Cir. 1990)). The EEOC guidance further explains:

> [A]lthough an employee cannot waive the right to file a charge with the EEOC, he can waive the right to recover in his own lawsuit as well as the right to recover in a lawsuit brought by the EEOC on his behalf.

Id. (citing *Cosmair*, 821 F.2d at 1091).

As the Second Circuit held in *Kidder, Peabody*, the same logic applies here. *Kidder, Peabody*, 156 F.3d at 302-03. An individual's decision to waive Title VII rights by settlement and release, or the election to have those rights adjudicated in an arbitral forum, precludes the EEOC from seeking remedies on his behalf.

Moreover, Title VII provides expressly that "[i]nterim earnings or amounts earnable with reasonable diligence by

the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1). Similarly, an individual's own misconduct may restrict the amount and types of relief available. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361-62 (1995) (holding that after-acquired evidence of misconduct justifying termination precludes reinstatement and front pay and limits back pay award.)

Thus, agreeing to arbitrate is only one of several means by which an individual is able to affect the extent to which the EEOC is able to pursue individual remedies in a public enforcement action on his or her behalf. While the EEOC maintains that its interests are independent of and go beyond the interests of the individual employee, the fact still remains that its pursuit of monetary relief is on behalf of that employee individually.

Neither the EEOC nor its *amici* suggest that the monetary relief it seeks in such a public enforcement action lands anywhere other than in the hands of the employee on whose behalf the action was pursued. The only "interest" that is served by victim-specific relief is the individual's. The EEOC's contention that its pursuit of such relief is in the "public interest" therefore is disingenuous, at best.

This Court should apply the logic employed by a number of federal courts in similar contexts, and in the past by the EEOC, and disallow the EEOC from seeking victim-specific relief on behalf of an individual who is subject to a valid agreement to arbitrate.

II. AUTHORIZING THE EEOC TO PURSUE VICTIM-SPECIFIC REMEDIES ON BEHALF OF INDIVIDUALS WHO ARE SUBJECT TO VALID AGREEMENTS TO ARBITRATE EMPLOYMENT CLAIMS WOULD UNDERMINE THE STRONG PUBLIC POLICY IN FAVOR OF ARBITRATION

A. The Court Has Confirmed Repeatedly That Arbitration Is a Valid Means of Resolving Employment-Related Disputes, Most Recently in *Circuit City v. Adams*

In *Gilmer v. Interstate/Johnson Lane Corp.*, this Court confirmed the validity of arbitration as a means of resolving employment-related disputes. 500 U.S. 20 (1991) (ruling that claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, can be subject to compulsory arbitration). In so doing, the Court reiterated its "strong endorsement of the federal statutes favoring this method of resolving claims." 500 U.S. at 30 (citation omitted).

Even prior to *Gilmer*, the Court recognized arbitration as the preferred method of resolving workplace grievances. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *see also United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *and United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) ("Steelworker's Trilogy").[5]

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[5] The first of the Steelworkers Trilogy was *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960). In that case, the Supreme Court concluded that only by giving "full play" to the means chosen for settlement—arbitration—would the congressional policy in Section 203(d) of the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act") be effectuated. *Id.* at 566. Therefore, the Court granted the union's petition to compel arbitration. Likewise, in *United*

Most recently, in *Circuit City Stores, Inc. v. Adams*, this Court reaffirmed the strong public policy favoring agreements to arbitrate employment disputes, acknowledging the "real benefits to the enforcement of arbitration provisions" while soundly rejecting "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001). As the Court reasoned, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* Thus, to exempt employment contracts from coverage under the FAA "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Id.* (citation omitted).

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the union petitioned the Court to compel arbitration by the employer. The Court noted that the "present federal policy is to promote industrial stabilization through the collective bargaining agreement." *Id.* at 578 (footnote omitted). The Court then remarked that a "major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *Id.* (footnote omitted). In addition, the Court noted that mandatory arbitration clauses were enforceable pursuant to Section 301 of the LMRA. *Id.* at 582-83. Finally, in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court narrowly construed its judicial review power of decisions made by arbitrators pursuant to collectively-bargained arbitration clauses. *Id.* at 596.

B. Permitting the EEOC To Litigate on Behalf of Individuals Who Have Signed Valid Agreements To Arbitrate Undercuts the Very Purposes for Which Arbitration Is Favored

Permitting the EEOC to pursue monetary damages on behalf of individuals who have signed valid agreements to arbitrate their employment claims would countermand this Court's pronouncements in *Circuit City* and *Gilmer* by thwarting the very purpose for which arbitration is used—avoidance of the costs and delays of litigation. Under such a rule, an employee could agree to arbitrate his claims, yet the EEOC would retain the right, notwithstanding his promise to resolve his grievance outside of court, to pursue monetary remedies on his behalf. Thus, while the employee is spared the expense and inconvenience of protracted litigation[6], his employer is not.

Even if the employee did elect to have his complaints resolved in the arbitral forum, under the rule endorsed by the EEOC, the arbiter's ultimate decision would lack the finality that is one of the primary reasons arbitration is valued, since the entire matter would be subject to relitigation.

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[6] As a practical matter and as amici for the EEOC readily concede, however, the EEOC actually litigates only one-half of one percent of all the discrimination charges it receives. Thus, for all those employees whose cause is not taken up by the EEOC, their *only* alternative, in the absence of an agreement to arbitrate, is to pursue a time-consuming and costly private action in federal court.

III. ALLOWING THE EEOC TO PURSUE VICTIM-SPECIFIC REMEDIES ON BEHALF OF AN EMPLOYEE WHO MAY SEEK SUCH RELIEF IN ARBITRATION WOULD DISCOURAGE EMPLOYERS FROM PARTICIPATING IN ALTERNATIVE MEANS OF DISPUTE RESOLUTION

As noted above, permitting the EEOC to maintain a public enforcement action in which it seeks victim-specific remedies on behalf of an individual who has agreed to arbitrate his claims would substantially discourage employers from offering arbitration to their employees as an alternative means of dispute resolution. Employers and employees who select arbitration as their forum of choice would not be able to rely on the arbitrator's decision in their quest for expeditious, affordable and final resolution of the matter. Instead, certainly the employer, if not the employee, would be required to expend additional time and resources relitigating issues that already had been disposed of in arbitration. Such a result is exactly the type that this Court sought to avoid in *Circuit City*, when it dismissed the notion that arbitration is a sort of "second-class" justice.

The result that the EEOC seeks would destroy much of the incentive employers now have to enter into arbitration agreements. By extension, the logic of the EEOC's position would allow it to circumvent even privately negotiated settlements, an authority even the agency itself does not explicitly claim.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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